

Oct 29, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHNSON FOODS, INC., a Washington
corporation, UNIGARD INSURANCE
COMPANY as subrogee to JOHNSON
FOODS, INC., a Washington corporation,

Plaintiffs,

v.

LETICA CORPORATION, a Michigan
corporation; DOES 1 through IV,

Defendants.

No. 1:16-CV-3197-LRS

**ORDER DENYING
MOTIONS FOR SUMMARY
JUDGMENT**

BEFORE THE COURT is Defendant Letica Corporation's (Letica's) Motion For Summary Judgment (ECF No. 34) and Plaintiffs' Motion For Summary Judgment (ECF No. 39). These motions were heard with oral argument on October 25, 2018. Sean A. Russel, Esq., argued for Plaintiffs. Amanda D. Daylong, Esq., argued for Defendant.

I. BACKGROUND

This is a diversity case removed from Yakima County Superior Court. Plaintiff Johnson Foods, Inc. (Johnson Foods) and its subrogee, Plaintiff Unigard Insurance Company (Unigard), assert four causes of action against Letica under the Washington Products Liability Act (WPLA), RCW Chapter 7.72, and one cause of action under the Washington Consumer Protection Act (CPA), RCW

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Chapter 19.86. The product liability causes of action include design defect, failure to warn, and breach of express and implied warranties. The CPA cause of action is premised on alleged false advertising.

Plaintiffs' summary judgment motion seeks to establish liability as a matter of law on all of the claims pled by Plaintiffs, with the only issue remaining for trial being damages.

Defendant seeks summary judgment on all of Plaintiffs' claims, asking the court to find as a matter of law there are no disputed facts to preclude a determination that Defendant did not violate the WPLA or the CPA.

II. UNDISPUTED FACTS

Johnson Foods is a food processor supplying processed cherries and asparagus to customers. It commonly uses square plastic 4-gallon containers and lids to store and ship processed cherry halves. Bins of fresh cherries are received at its Sunnyside plant which are then washed, pitted, and run along an automated line and into the open plastic containers. The filled and sealed containers are then placed in freezer storage where they become "block frozen" while awaiting shipment to customers. One of these customers is Agrana Fruit U.S., Inc. (Agrana).

Letica is a manufacturer of injection-molded high-density polyethylene (HDPE) commercial food containers. In 2013, Johnson Foods ordered 30,000 4LSQ lids (square plastic lids) and 4QH buckets (four-gallon square plastic buckets) from Letica for use in processing its halved cherries. Johnson Foods used these Letica containers to ship block-frozen cherries to Agrana.

The 4LSQ lid is a square, gasket-less, peel off, injection-molded HDPE product, compatible with Letica's 4-gallon square containers, including the 4QH container. The lid and container have a "wiper plug fit" which provides a tight seal without need for a gasket. The 4LSQ lid is designed so that it locks to the

1 4QH container in four places in the middle of each side of the lid. The 4LSQ lid is
2 imprinted with the instruction to “LIFT ARROWS TO OPEN” with four arrows
3 pointing to the four sides of the lid.

4 On October 30, 2013, Johnson Foods received notice from Agrana that it
5 was finding small pieces of white plastic inside the containers and within the
6 frozen cherries. Agrana uses an opening tool known as a Quickie tool to remove
7 plastic lids at the corners of the plastic containers. Once the lids are removed,
8 Agrana places the contents of the containers onto a scale for weighing and an
9 initial inspection. It was during the weighing and inspection process that Agrana
10 discovered small pieces of white plastic mixed in and around the frozen cherry
11 block. Agrana returned the product and the containers to Johnson Foods.

12 Johnson Foods ordered and received new 4LSQ lids from Letica believing
13 the original shipment of lids might be defective. Johnson Foods began “re-
14 lidding” the containers. The “re-lidding” process included removing the original
15 Letica lids from the corners with the Quickie tool, removing all small pieces of
16 white plastic that were observable on the top of the block-frozen cherries, and
17 securing a new 4LSQ Letica lid on the Letica container using a hydraulic lid closer
18 purchased upon the recommendation of Letica after the contamination had been
19 discovered.

20 Johnson Foods shipped the “re-lidded” product to Agrana, but Agrana still
21 found small white plastic pieces embedded in and around the block-frozen
22 cherries. Agrana rejected the entire Johnson Foods order and shipped
23 approximately 16,000 full containers back to Johnson Foods.

24 25 **III. SUMMARY JUDGMENT STANDARD**

26 The purpose of summary judgment is to avoid unnecessary trials when there
27 is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d
28 1129 (9th Cir.), *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469 (1975). Under Fed. R.

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1 Civ. P. 56, a party is entitled to summary judgment where the documentary
2 evidence produced by the parties permits only one conclusion. *Anderson v.*
3 *Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505 (1986); *Semegen v.*
4 *Weidner*, 780 F.2d 727, 732 (9th Cir. 1985). Summary judgment is precluded if
5 there exists a genuine dispute over a fact that might affect the outcome of the suit
6 under the governing law. *Anderson*, 477 U.S. at 248. A dispute about a material
7 fact is “genuine” if the evidence is such that a reasonable fact-finder could find in
8 favor of the non-moving party. *Id.*

9 The moving party has the initial burden to prove that no genuine issue of
10 material fact exists. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475
11 U.S. 574, 586, 106 S.Ct. 1348 (1986). Once the moving party has carried its
12 burden under Rule 56, "its opponent must do more than simply show that there is
13 some metaphysical doubt as to the material facts." *Id.* The party opposing
14 summary judgment must go beyond the pleadings to designate specific facts
15 establishing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325,
16 106 S.Ct. 2548 (1986).

17 When considering a motion for summary judgment, the court does not
18 weigh the evidence or assess credibility; instead “the evidence of the non-movant
19 is to be believed, and all justifiable inferences are to be drawn in [her] favor.”
20 *Anderson*, 477 U.S. at 255. Nonetheless, summary judgment is required against a
21 party who fails to make a showing sufficient to establish an essential element of a
22 claim, even if there are genuine factual disputes regarding other elements of the
23 claim. *Celotex*, 477 U.S. at 322-23.

24 25 **IV. DISCUSSION**

26 All of the claims asserted by Johnson Foods in this matter hinge, at least in
27 part, on the question of whether Letica provided an adequate instruction/warning
28 regarding opening the 4LSQ lids on the 4QH containers (also referred to herein as

1 “buckets”). Many of Defendant’s arguments are premised on its belief that the
2 instruction on the lid was clear and therefore, the failure of Johnson Foods to
3 follow the instruction was the proximate cause of its damages. Accordingly, the
4 issue of failure to adequately instruct/warn is where the court begins its analysis.

5 6 **A. WPLA**

7 **1. Failure To Adequately Instruct/Warn**

8 RCW 7.72.030(1)(b) provides:

9 A product is not reasonably safe because adequate warnings
10 or instructions were not provided with the product, if, at the
11 time of manufacture, the likelihood that the product would
12 cause the claimant’s harm or similar harms, and the seriousness
13 of those harms, rendered the warnings or instructions of the
14 manufacturer inadequate and the manufacturer could have
15 provided the warnings or instructions which the claimant
16 alleges would have been adequate.

17 Claims for failure to adequately warn may be based on either the risk-utility
18 test or on the consumer expectations test. *Thongchoom v. Graco Children’s*
19 *Products, Inc.*, 117 Wn. App. 299, 71 P.3d 214 (2003). The adequacy of
20 warnings, like the reasonable safety of the product’s design, is determined by a
21 standard of the consumer’s reasonable expectations, not by whether the
22 manufacturer used reasonable care in providing warnings. *Ayers v. Johnson &*
23 *Johnson Baby Products Co.*, 117 Wn.2d 747, 762 , 818 P.2d 1337 (1991).
24 Inadequate warnings subject a manufacturer to strict liability and therefore,
25 foreseeability of risk is not an element of proof as it is in negligence cases. Thus,
26 in *Ayers*, where an infant aspirated baby oil, causing severe injuries, it was error
27 for the trial court to require proof that the risk of aspiration was foreseeable. Even
28 if the product manufactured by the defendant does not pose a risk of harm, so long
as the product will foreseeably be used in conjunction with products that can cause
harm, a duty to warn may arise. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d
402, 416, 282 P.3d 1069 (2012).

1 In a warning defect case, the risk-utility analysis is whether the
2 manufacturer could have provided warnings that would have prevented the injury.
3 Unlike the cost of an alternative design, the cost of providing additional warnings
4 is typically minimal and therefore, a product may be defective if it fails to warn of
5 a risk, even a remote one, so long as the manufacturer is in a position to provide
6 adequate warning. *Macias*, 175 Wn.2d at 419. Nevertheless, a failure to provide
7 adequate warning will not result in liability unless the plaintiff can show that the
8 lack of adequate warning was a proximate cause of the injuries sustained. *Soproni*
9 *v. Polygon Apartment Partners*, 137 Wn.2d 319, 326, 971 P.2d 500 (1999).

10 A product that is safe for use when a warning is followed is neither
11 defective nor is it unreasonably dangerous. *Baughn v. Honda Motor Co.*, 107 Wn.
12 2d 127, 136, 727 P.2d 655 (1986), citing Restatement (Second) of Torts §402A
13 cmt. J (1965).

14 The adequacy of a warning will generally be a question of fact, but a
15 question of fact can be determined as a matter of law when reasonable minds can
16 reach only one conclusion from the admissible evidence. *Estate of La Montagne*
17 *v. Bristol-Myers Squibb*, 127 Wn. App. 335, 343, 111 P.3d 857 (2005).

18 An instruction is intended to encourage “effective use” of the product,
19 whereas a warning is intended to assure a “safe” use of the product. *McCully v.*
20 *Fuller Brush Co.*, 68 Wn. 2d 675, 679, 415 P.2d 7 (1966).

21 John Selina has been the product design manager at Letica for the past 14
22 years. (ECF No. 41-1 at p. 9). He was deposed on August 17, 2018. He
23 acknowledged Letica does testing regarding opening and closing lids on its
24 buckets and that it has tested the 4LSQ lids and 4QH buckets by opening them at
25 various locations on the lids. (*Id.* at p. 17). Asked what testing had been done,
26 Selina stated “[w]e’ve also done destructive tests, seeing what would happen if
27 [we] used a tool or some other means to open from the corners or from the sides.”
28 (*Id.* at pp. 17-18). Asked by his own counsel whether this destructive testing was

1 done “after this lawsuit,” Selina answered that “[w]e do it on all of our products.”
2 (*Id.* at p. 19).¹

3 Selina indicated Letica does destructive testing on “any new design,” using
4 “tools or some other unconventional method to take the lid off in the corners,
5 sides, so forth.” (*Id.*). According to Selina:

6 **We do it on a regular basis, ongoing basis, to all of our**
7 **products,** using tools, container lid opening tools, as well
8 as screwdrivers, and whatever else we may have handy
9 that somebody might use.

10 (*Id.* at 19)(emphasis added).

11 Selina stated the tools used in the testing include the Husky tool and the
12 Quickie tool. (*Id.* at 20). He testified his experience with the Quickie tool is it is
13 “destructive” in that it “attacks the plastic” and “gouges the plastic.” (*Id.*). Selina
14 maintained the lids are designed to be taken off by hand. (*Id.*). He testified that
15 warnings are not put on the lids identifying tools that would do damage because
16 the lids are made to be removed by hand and there would not be enough room on
17 the lids to list all of the tools that would cause damage. (*Id.* at p. 30). Selina says
18 he is not aware of any written instructions being delivered to customers when they
19 purchase Letica products. (*Id.*).

20 On September 21, 2018, Selina, in an attempt to “expand and clarify” his
21 comments regarding the impact of using the Quickie tool, made the following
22 “correction” to his deposition: “I’m not aware of any testing during the initial
23 development of the 4QH/4LSQ Package as it was developed over 33 years ago.”
24 He asserted the destructive testing to which he testified “was completed after this
25

26 ¹ The lawsuit was filed in Yakima County Superior Court on October 12,
27 2016, and removed to federal court on November 2, 2016. (ECF No. 1).
28

1 litigation started.” (ECF No. 48-5).² During his deposition, Selina was
2 specifically asked by his counsel whether destructive testing was done after this
3 lawsuit started. He stated destructive testing of all of Letica products occurs on a
4 regular, ongoing basis. He certainly did not assert that destructive testing was
5 done only after the lawsuit started, even though he clearly had an opportunity to
6 do so.

7 Selena’s credibility is something which a jury will decide. The court notes,
8 however, that it does not matter if Letica knew before or after the lawsuit started
9 that opening the lids at the corners would cause damage to the plastic. As
10 discussed herein, the WPLA is a strict liability statute. The question is whether
11 there was an adequate instruction/warning regarding the use of the product and
12 whether the product was defectively designed. It is not critical whether the
13 manufacturer knew the product was defectively designed or when it knew such.
14 Under the CPA, as discussed *infra*, all a plaintiff needs to prove is the defendant
15 engaged in an unfair or deceptive act or practice. The plaintiff does not need to
16 prove intent to deceive.

17 Cameron Main was a sales representative for Letica. He made a cold call to
18 Gary Johnson, President of Johnson Foods, which led to Johnson Foods
19 purchasing the lids and buckets in question. (ECF No. 41-1 at p. 50). He knew
20 Johnson Foods intended to use the buckets to put cherries in them. (*Id.* at p. 53).
21 He did not discuss with Gary Johnson or anyone at Johnson Foods the removal of
22

23 ² In Defendant’s Reply in support of its motion for summary judgment
24 (Footnote 1 at p. 7 of ECF No. 56), it says testing was not conducted until the
25 2013 events giving rise to this litigation. That appears to be inconsistent with an
26
27 assertion that testing was not conducted until after the lawsuit started.
28

1 the lids from the buckets. (*Id.* at 59-60). He did not discuss with Johnson Foods
2 or any other customer what tool could be used to remove the lids and does not
3 know what tool could be used. (*Id.* at 62). Letica did not require Main to provide
4 instructions or warnings to customers. (*Id.* at 83).

5 Kraig Alexander is the Director of Quality at Letica. (ECF No. 41-1 at p.
6 109). During his deposition, he testified he was unaware if Letica sales
7 representatives are trained to provide warnings regarding the 4LSQ lids and 4QH
8 buckets. (*Id.* at p. 126). According to him, the only instruction provided to
9 customers is what is printed on the lids: “LIFT ARROWS TO OPEN” with four
10 arrows pointing to the four sides of the lids. (*Id.* at p. 127). In an email to Gary
11 Johnson dated May 30, 2014, Alexander included some pictures of a tool that
12 could be used to remove the lids and indicated he had ordered some of those to be
13 delivered to Johnson Foods. (ECF No. 36-2). This tool was the Husky tool which
14 is used to open the lids at the sides where the arrows are located.

15 Gary Johnson notes this email came seven months after Letica was notified
16 by Johnson Foods of plastic parts being found in the cherries sent to Agrana.
17 (ECF No. 60). He further asserts this email came after Johnson Foods had
18 completed re-lidding the Letica buckets and was the first time Letica provided
19 Johnson Foods with information how to properly remove the lids. (*Id.*).
20 According to Johnson, the information was too late because the damages had
21 already been incurred. (*Id.*).

22 In his April 5, 2018 deposition, Alexander said he believes the May 30,
23 2014 email represented the first time he recommended to Gary Johnson that he use
24 the Husky tool to remove the lids and was the only time he sent Johnson a picture
25 of the Husky tool. (ECF No. 57 at pp. 58-59).

26 Warren F. Harris is a forensic chemist who was retained by Plaintiffs “to
27 characterize the cause of the food contamination through a non-destructive
28 examination of a subject bucket and lid and through an examination of slivers and

1 fragments.” The work “also included destructive simulation testing of exemplar
2 buckets and lids.” (ECF No. 38-5 at p. 4). At his deposition, Harris testified the
3 Quickie tool used by Johnson Foods did not work to open the lids from the sides
4 because the hook did not fit on the sides. (ECF No. 38-4 at p. 18). When the
5 Quickie tool was used to open the lids from the corners, Harris testified he was
6 able to simulate production of plastic fragments. (*Id.*).³ Although not within the
7 scope of the work for which he was retained and therefore, not an opinion
8 expressed in his report (ECF No. 38-5), Harris opined during his deposition that
9 the instruction contained on the lids- “LIFT ARROWS TO OPEN” with four
10 arrows pointing to the four sides of the lids- was “adequate.” (ECF No. 38-4 at p.
11 43).

12 The adequacy of the instruction is a question for a jury based on the
13 applicable law as to which the jury is instructed (e.g., the risk-utility test).
14 Therefore, the court believes Harris’ opinion on the issue is irrelevant and even if
15 relevant, unduly prejudicial, and should not be allowed at trial. It follows that
16 Defendant’s expert, Dwayne Arola, Ph.D., should also not be allowed to offer an
17 opinion on this issue. The adequacy of the instruction was not part of the scope of
18 the opinions Dr. Arola was retained by Defendant to offer (see original report at
19

20 ³ In his report (Paragraph 3.9 at p. 8 of ECF No. 38-5), Harris wrote:
21

22 In all cases[,] the Letica . . . lids included directions and arrows
23 indicating how to remove the lids. In both cases[,] removal of the lid
24 is by prying from the sides as opposed to the corners. Through our
25 simulative bucket opening tests, it was determined that the acquired
26 bucket opening tool used by Johnson Foods to reopen the returned
27 stock of buckets [the Quickie tool] could only open the bucket from
28 the corners and could not be oriented to open the bucket correctly
from the sides. As previously discussed[,] this method would
produce fragments from the outer corner of the bucket.

1 ECF No. 48-13), although he arguably may have offered such an opinion in his
2 supplemental report (see ECF No. 48-15 at p. 6). Adequacy of the instruction is
3 something that need not be testified to by an expert as it a question that can and
4 should be answered by the average layperson. This is not an instance where an
5 “expert’s scientific, technical, or other specialized knowledge will help the trier of
6 fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid.
7 702(a).

8 Notwithstanding the instruction on the 4LSQ lids, a jury could reasonably
9 conclude there was a significant likelihood a buyer would attempt to open the lids
10 at the corners. These lids were sealed tight to avoid spillage of food product and
11 although Letica maintains they were intended to be removed by hand, it also
12 recommended the Husky tool and touted the seal created by the wiper plug fit
13 between the lid and the bucket.

14 Johnson Foods contends a warning should have been provided that the lids
15 were to be popped open only at the sides and should have been imprinted on the
16 lids themselves, inserted in product literature, or conveyed verbally through an
17 instructional session between Letica’s salespersons and customers. Johnson Foods
18 says that in lieu of or in addition to a warning on the lids that they were to be
19 popped open only at the sides, Letica could have included a warning on the lids
20 that they were not to be opened at the corners and were to be opened only by hand.
21 Johnson Foods contends a warning would have allowed it to take the necessary
22 steps to avoid incurring damages.

23 Letica seemingly acknowledges that what was imprinted on the lids- “LIFT
24 ARROWS TO OPEN” with four arrows pointing to the four sides of the lids- was
25 not a warning intended to assure a “safe” use of the product, but rather an
26 instruction intended to encourage “effective use” of the product. A jury should
27 decide if this instruction was adequate. Because there is an issue of material fact
28 regarding the adequacy of the instruction, there is also an issue of material fact

1 whether the absence of an adequate instruction/warning was the proximate cause
2 of the damages Johnson Foods claims to have suffered. The threshold question
3 regarding proximate cause is not whether misuse caused the damage, but whether
4 absence of an adequate instruction/warning did. A question of factual causation
5 will only be decided as a matter of law “if the causal connection is so speculative
6 and indirect that reasonable minds could not differ.” *Doherty v. Municipality of*
7 *Metropolitan Seattle*, 83 Wn. App. 464, 469, 921 P.2d 1098 (1996).

8 Summary judgment should not be granted to a defendant where a reasonable
9 jury viewing the record could find by a preponderance of the evidence that
10 plaintiff is entitled to a favorable verdict. *George v. Edholm*, 752 F.3d 1206, 1214
11 (9th Cir. 2014). Based on the record in this case, a reasonable jury could conclude
12 under the consumer expectations test that Johnson Foods had a reasonable
13 expectation that it would be provided additional instruction and/or warning to only
14 lift the lids open at the sides and to not pry them open from the corners.⁴ Under
15 the risk utility test, a reasonable jury could find by a preponderance of the
16 evidence there was a likelihood the lid/bucket package would cause the harm
17 suffered by Johnson Foods and that considering the seriousness of the harm
18 (plastic particles in food product), the instruction on the lids regarding opening of
19 the same was inadequate and Letica could have provided the instruction/warning
20 Johnson Foods contends would have been adequate. Letica knew the lid/bucket
21 package was going to be used by Johnson Foods to store food and a jury could

23 ⁴ Based on the current state of the record, a jury will have to decide how
24
25 “ordinary” a consumer Johnson Foods is and if it possessed a higher level of
26
27 sophistication that should factor into the reasonableness of its expectation.
28

1 reasonably conclude this made it even more imperative that Letica provide an
2 appropriate instruction/warning. A jury could reasonably conclude it would not
3 have been burdensome or unduly costly for Letica to provide an additional
4 instruction and/or warning to Johnson Foods on the lids and/or by other means.⁵
5 Johnson Foods does not contend Letica needed to list on the lids all the tools that
6 could possibly cause damage if they were used to open the lids. The gravity of
7 potential harm and the seemingly minimal cost and feasibility of eliminating the
8 risk could lead a jury to reasonably conclude Letica's instruction on the lids was
9 inadequate.

10 Letica contends that on or around July 1, 2014, Johnson Food employees
11 were filmed removing 4LSQ lids from the corners using the Quickie tool.
12 (Declaration of Kraig Alexander, ECF No. 49 at Paragraph 8, and Ex. C thereto;
13 see also ECF No. 58 at Paragraph 24). Contrary to Letica's assertion, it is not
14 uncontroverted that Johnson Foods knowingly continued to misuse the lids and
15 containers after Letica's May 30, 2014 email. That very short email said nothing
16 specific about not attempting to open the lids at the corners and only opening the
17 lids at the sides. The email reads: "Here are some lid pictures of the lid removal
18 tools we discussed. I have ordered some and they will be delivered Monday
19 morning to your attention." (ECF No. 49-2). And as noted above, Gary Johnson
20 asserts the Agrana-related damages for which Plaintiffs seek recovery had already
21 been incurred by May 30, 2014.

22 The fact Johnson Foods was aware of the instruction on the lids and opened
23 the containers from the corners is not dispositive, nor is it dispositive that the only
24 Johnson Foods customer who complained about plastic in the cherry product was
25

26 ⁵ The record indicates Johnson Foods was charged \$1.49 for each bucket
27 and \$.51 for each lid, for a total of two dollars. (ECF No. 54-3 at p. 14).
28

1 Agrana which also opened the lids from the corners. As discussed above, the
2 adequacy of an instruction/warning will generally be a question of fact and that is
3 true in this case.

4 5 **2. Defective Design**

6 RCW 7.72.030(1) states a “product manufacturer is subject to liability to a
7 claimant if the claimant’s harm was proximately caused by the negligence of the
8 manufacturer in that the product was not reasonably safe as designed.”

9 There are two different ways for a plaintiff to show that a product was
10 defectively designed. The first way is the risk-utility approach specified in RCW
11 7.72.30(1)(a):

12 A product is not reasonably safe as designed, if, at the time
13 of manufacture, the likelihood that the product would cause
14 the claimant’s harm or similar harms, and the seriousness of
15 those harms, outweighed the burden on the manufacturer to
16 design a product that would have prevented those harms and
17 the adverse effect that an alternative design that was practical
18 and feasible would have on the usefulness of the product.

16 The second way is the consumer-expectations approach specified in RCW
17 7.72.030(3) in which the plaintiff shows the product “was unsafe to an extent
18 beyond that which would be contemplated by the ordinary consumer.” According
19 to *Seattle-First Nat’l Bank v. Tabert*, 86 Wn.2d 127, 154, 727 P.2d 655 (1986):

20 In determining the reasonable expectations of the ordinary
21 consumer, a number of factors must be considered. The
22 relative cost of the product, the gravity of the potential harm
23 from the claimed defect and the cost and feasibility of
24 eliminating or minimizing the risk may be relevant in a
25 particular case. In other instances[,] the nature of the
26 product or the nature of the claimed defect may make other
27 factors relevant to the issue.

25 These approaches are alternative, independent means of proving defective
26 design. A plaintiff need prove only one, not both, of these alternatives. *Ruiz-*
27 *Guzman v. Amvac Chem. Corp.*, 141 Wn.2d 493, 502-03, 7 P.3d 795 (2000).

28 The risk-utility test involves strict liability principles even though RCW

1 7.72.030(1) refers to “negligence.” The “negligence” referred to in the statute is
2 the “negligence of the manufacturer in that the product was not reasonably safe.”
3 *Falk v. Keene Corp.*, 113 Wn.2d 645, 657, 782 P.2d 974 (1989).

4 The risk-utility test requires a balancing of factors as explained in *Ayers*,
5 117 Wn.2d at 763:

6 On one side of the balance in subsection (a) are the likelihood
7 that the product would cause the claimant’s harm or similar
8 harms and the seriousness of those harms. On the other side
9 of subsection (a)’s balance are the burden on the manufacturer
to design a product that would have prevented those harms,
and the adverse effect that a feasible alternative design would
have on the usefulness of the product.

10 Johnson Foods claims the 4LSQ lids and 4QH buckets were defectively
11 designed because if the lids were opened at the corners, as they were here, plastic
12 parts would tear away from the lids and/or buckets and end up in the food product.
13 According to Johnson Foods, “[t]he alternate design which would have prevented
14 Johnson Foods from peeling the plastic 4LSQ lids from the corners and
15 subsequently incurring damages would have been to emboss a simple warning on
16 the lids which warned of potential contamination if the lids are peeled off at the
17 corners.” Gary Johnson maintains that had Letica provided any warning at all,
18 such as stating the lids could only be removed at their sides, either by hand or with
19 the Husky tool, Johnson Foods would have notified Agrana and itself would not
20 have removed the lids at the corners. (Johnson Declaration, ECF No. 54 at
21 Paragraph 1). It is for a jury to decide Johnson’s credibility. Potentially relevant
22 in that regard is Letica’s claim that Johnson Foods continued to peel 4LSQ lids off
23 at the corners in July 2014.

24 For essentially the same reasons there is an issue of material fact regarding
25 the adequacy of the instruction/warning provided by Letica, there is an issue of
26 material fact whether Letica’s lid/bucket package was defectively designed. These
27 issues are inextricably intertwined. Proper removal of the lids is not the question.
28

1 The question is whether Johnson Foods was adequately instructed/warned
2 regarding proper removal of the lids. If the instruction on the lids was inadequate,
3 then there is clearly an issue whether the product (the lid/bucket package) was
4 defectively designed because improper removal resulted in plastic fragments being
5 deposited in the food stored and shipped in the buckets.

6 7 **3. Express Warranties**

8 RCW 7.72.030(2) provides:

9 A product manufacturer is subject to strict liability to a
10 claimant if the claimant's harm was proximately caused
11 by the fact that the product was not reasonably safe in
12 construction or not reasonably safe because it did not
conform to the manufacturer's express warranty or to
the implied warranties under Title 62A RCW.

13 RCW 7.72.030(2)(b) states that "[a] product does not conform to the express
14 warranty of the manufacturer if it is made part of the basis of the bargain and
15 relates to a material fact or facts concerning the product and the express warranty
16 proved to be untrue." Even if a product contains no defects in construction, design
17 or warning, liability will be imposed upon a manufacturer or seller who makes
18 express warranties concerning the performance of the product. Express warranties
19 may be in words (oral or written), or they may appear in the form of pictures,
20 samples, or models that create an expectation on the part of the consumer that a
21 product is safe for use in the manner depicted. 16A Wash. Practice Tort Law and
22 Practice, §17:15 (4th ed.).

23 RCW 62A.2-313(1) provides that express warranties by the seller are
24 created in the following instances: (a) any affirmation of fact or promise made by
25 the seller to the buyer which relates to the goods and becomes part of the basis of
26 the bargain creates an express warranty; and (b) any description of the goods
27 which is made part of the basis of the bargain creates an express warranty that the
28 goods shall conform to the description.

1 According to RCW 62A.2-313(2):

2 It is not necessary to the creation of an express warranty
3 that the seller use formal words such as “warrant” or “guarantee”
4 or that he or she have specific intention to make a warranty, but
5 an affirmation merely of the value of the goods or a statement
6 purporting to be merely the seller’s opinion or commendation of
7 the goods does not create a warranty.

8 There is a genuine issue of material fact whether Letica, through its
9 salesperson, Cameron Main, made an express warranty concerning the
10 performance of the 4LSQ lids and the 4QH buckets. Main knew Johnson Foods
11 intended to use the buckets to store and transport cherries, a food-grade product.
12 (ECF No. 41-1 at p. 53). Gary Johnson claims he “relied exclusively on the skill
13 and judgment of [Main] to assist in selecting the appropriate buckets and lids for
14 Johnson Foods’ product.” (ECF No. 54 at Paragraph 4). Main communicated
15 with Johnson in person and by email and telephone. (ECF No. 41-1 at p. 54). In
16 an email dated June 5, 2013, Main advised Johnson the 4QH bucket should be
17 “great” for the upcoming season. Attached to the email was a product
18 specification sheet for the 4QH bucket. (ECF No. 54-2 at p. 10). In another email
19 dated June 6, 2013, he advised Johnson he was “confident in telling [him] this
20 container is what you are looking for.” (ECF No. 54-3 at p. 15).

21 There is enough in the record that a jury could reasonably conclude Main’s
22 representations constituted an affirmation of fact or promise relating to the
23 lid/bucket package which became part of the basis of the bargain between Johnson
24 Foods and Letica, and/or that Main’s representations constituted a description of
25 the lid/bucket package which was made part of the basis of the bargain. A jury will
26 decide whether Main’s statements constitute an “affirmation merely of the value of
27 the goods or a statement purporting to be merely the seller’s opinion or
28 commendation of the goods” which did not create a warranty.

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1 **4. Implied Warranties**

2 Whether or not an implied warranty exists is determined by reference to the
3 Uniform Commercial Code, RCW Title 62A. RCW 7.72.030(2)(c).

4 RCW 62A.2-314 provides for an implied warranty of merchantability: “[A]
5 warranty that the goods shall be merchantable is implied in a contract for their sale
6 if the seller is a merchant with respect to goods of that kind.” Implied warranty of
7 merchantability encompasses considerations of the . . . adequacy of the package
8 and label.” *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 89, 896 P.2d 682 (1995).

9 RCW 62A.2-315 provides for an implied warranty of fitness for a particular
10 purpose:

11 Where the seller at the time of contracting has reason
12 to know of any particular purpose for which the goods are
13 required and the buyer is relying on the seller’s skill or
14 judgment to select or furnish suitable goods, there is . . .
 an implied warranty that the goods shall be fit for such
 purpose.

15 Because there is an issue of material fact regarding the adequacy of the
16 instruction/warning provided by Letica, a jury will decide whether Letica breached
17 an implied warranty of merchantability with regard to the lid/bucket package it
18 sold Johnson Foods.

19 As discussed above, there is evidence in the record that Letica knew the
20 particular purpose for which Johnson Foods needed the lid/bucket package
21 (storing and shipping cherries) and Johnson Foods relied on Letica’s skill and
22 judgment in deciding to purchase the lid/bucket package. Accordingly, a jury will
23 decide if Letica breached an implied warranty of fitness for a particular purpose.⁶
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25

26 ⁶ Johnson Foods says the lids/buckets were used as intended because they
27
28 were used to store food; Letica says the lids/buckets were not used as intended

5. Economic Loss

“Harm” for which claims can be made under the WPLA includes any damages recognized by the courts of the State of Washington, but does not include direct or consequential economic loss under the Uniform Commercial Code, RCW Title 62A. RCW 7.72.010(6). Economic loss must be pursued through contractual remedies, not through tort remedies like the WPLA. The WPLA cannot be used to circumvent the freedom of the parties to make contractual provision for the risk of loss. *Alejandre v. Bull*, 159 Wn.2d 674, 682-83, 153 P.3d 864 (2007).

In a case involving a mixture of economic loss and property loss, the Washington Supreme Court has held that economic loss is determined through a “risk of harm” analysis. There is potential liability for any product that poses a “risk of harm” to person or property, even if such harm has not actually occurred. On the other hand, economic loss that results from product failure not posing a risk of harm will not give rise to a product liability claim. *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn. 2d 847, 853, 774 P.2d 1199 (1989), opinion amended on other grounds, 779 P.2d 697 (1989). In determining whether the WPLA applies, the court examines whether there is damage only to the product itself, or whether the product has damaged other property. *Jackson v. City of Seattle*, 158 Wn. App. 647, 244 P.3d 425 (2010). Thus, in *Stanton v. Bayliner*

because Johnson Foods did not follow the instruction on the lid regarding removal of the lid. Again, the threshold issue is the adequacy of the instruction. If the jury finds the instruction was adequate, it seemingly cannot find there was a breach of any warranties, express or implied.

1 *Marine Corp.*, 123 Wn.2d 64, 866 P.2d 15 (1993), the court held the WPLA
2 applied and the manufacturer could be held liable for the loss of a boat due to
3 sudden flooding. Even though the damage was to the product itself (the boat), the
4 allegedly defective design posed a risk of harm to passengers on the boat.

5 According to Johnson Foods, the contamination of the frozen cherries
6 resulted in the rejection of those cherries by Agrana and “[t]his damaged Johnson
7 foods by causing it to incur unnecessary and significant costs associated with
8 relidding and repacking its product” and “caused Agrana to incur shipping costs,
9 which were ultimately covered by [Unigard].” Elsewhere, Johnson Foods says the
10 injuries to its business and property include loss of profits as a result of having to
11 dispose of contaminated product, costs of culling and repacking, costs incurred to
12 repurchase lids from Letica, and costs incurred in re-shipping the cherry product to
13 Agrana.

14 Letica asserts that because Plaintiffs seek only damages for economic loss
15 which are not recoverable under the WPLA, Letica should be granted an extension
16 to file a motion for summary judgment on this issue which should be briefed and
17 heard on an expedited basis. Letica does not explain why this issue could not have
18 been addressed in its motion for summary judgment filed on September 5, the
19 dispositive motion filing deadline specified in the court’s Second Amended
20 Scheduling Order (ECF No. 32) filed on April 19, 2018. Johnson Foods says it
21 disclosed its damages twice on March 24, 2017, once in its initial disclosures and
22 a second time in its answers to Letica’s First Set Of Interrogatories and Requests
23 For Production Of Documents. It says it disclosed the damages a third time on
24 September 5, 2017, during the deposition of Gary Johnson.

25 Letica has not shown good cause for an extension of time, as required by
26 Fed. R. Civ. P. 16(b)(4), to file an additional dispositive motion regarding the
27 economic loss issue. This is an issue which Letica can address in a motion in
28 limine. The court notes, however, that its initial impression is the damages sought

1 by Johnson Foods are recoverable under the WPLA because it is alleged the
2 lid/bucket package damaged another product (frozen cherries stored and shipped
3 in the buckets) and posed a risk of harm to the public. Moreover, as discussed
4 below, damages for economic loss are recoverable under the CPA.

5 6 **B. CPA**

7 The Consumer Protection Act prohibits unfair methods of competition and
8 unfair or deceptive acts or practices in trade or commerce. RCW 19.86.020. The
9 CPA has been applied in product liability cases. *Hiner v. Bridgestone/Firestone,*
10 *Inc.*, 138 Wn. 2d 248, 978 P.2d 505 (1999). Proof of violation of the CPA entitles
11 a plaintiff to remedies including actual damages, treble damages (up to a
12 maximum of \$25,000), attorney's fees, and statutory costs. RCW 19.86.090.
13 Economic loss is recoverable as actual damages under the CPA so long as the
14 injury is to the plaintiff's business or property, and not a personal injury. *Ambach*
15 *v. French*, 141 Wn. App. 782, 790, 173 P.3d 941, 945 (2007), reversed at 167 Wn.
16 2d 167 (2009). CPA damages are not subject to contractual limitations. *Riley v.*
17 *Iron Gate Self Storage*, 198 Wn. App. 692, 395 P.3d 1059 (2017).

18 The five elements of a CPA claim are as follows: (1) an unfair or deceptive
19 act or practice; (2) in trade or commerce; (3) public interest; (4) injury to business
20 or property; and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco*
21 *Title Ins. Co.*, 105 Wn. 2d 778, 787-93, 719 P.2d 531 (1986). In order to prove
22 the existence of an unfair or deceptive act or practice, it is sufficient to show the
23 act or practice had the capacity to deceive a substantial portion of the public. It is
24 not necessary to show intent to deceive. *Behnke v. Ahrens*, 172 Wn. App. 281,
25 294 P.3d 729 (2012). The public interest element is met if the unfair or deceptive
26 act has or had the capacity to injure other persons. RCW 19.86.093. Causation
27 means "proximate cause," a cause which in direct sequence, unbroken by any new
28 independent cause, produces the injury complained of and without which such

injury would not have happened. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn. 2d 299, 314, 858 P.2d 1054 (1993).

A jury could find that an inadequate instruction on a product amounts to a misleading or misrepresentation of something of material importance with a capacity to deceive a substantial portion of the public. *Holiday Report Cmty. Ass'n v. Echo Lakes Assocs., LLC*, 134 Wn. App. 210, 226, 135 P.3d 499 (2006). While there may be no evidence that Letica or any of its agents represented to Johnson Foods that opening the buckets in any manner other than pursuant to the instruction imprinted on the lids was safe, that is not the issue. The issue is what was not stated on the lids or otherwise, and whether that rendered inadequate what was imprinted on the lids. The CPA "shall be liberally construed that its beneficial purposes may be served." RCW 19.86.920.

For the same reason the WPLA claims need to be resolved by a jury- an issue of material fact regarding the adequacy of the instruction imprinted on the lids- the CPA claim must also be resolved by a jury. If the act or practice is not in dispute, the court may decide whether that act or practice was deceptive as a matter of law, but it is not compelled to do so. *Leingang v. Pierce County Med. Bureau*, 131 Wn. 2d 133, 149-50, 930 P.2d 288 (1997).

V. CONCLUSION

The critical question is whether the instruction imprinted on the 4LSQ lids was adequate. Based on the record before it, the court cannot determine as a matter of law that the instruction was adequate or inadequate. This is an issue of fact which requires resolution by a jury. If the instruction was adequate, it seems all of Plaintiffs' claims fail. If, however, the instruction was not adequate, it appears most, if not all, of Plaintiffs' claims will succeed.

Defendant's Motion For Summary Judgment (ECF No. 34) and Plaintiffs' Motion For Summary Judgment (ECF No. 39) are **DENIED**. Defendant's request

1 for an extension to file an additional motion for summary judgment is **DENIED**.

2 **IT IS SO ORDERED.** The District Executive is directed to forward copies
3 of this order to counsel of record.

4 **DATED** this 29th of October, 2018.

5 *s/Lonny R. Suko*

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7 LONNY R. SUKO
8 Senior United States District Judge
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